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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 581

LOREN R. GAJEWSKI and MERVIN A. GAJEWSKI,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners respectfully ask this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (App. A, *infra*), is reported at 321 F.2d 261.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26th, 1963 (App. B, *infra*). A timely Petition for Rehearing was denied on August 26th, 1963 (App. C, *infra*). A timely Application to the Court of Appeals for a Stay of Mandate for Thirty days was granted on September 5th, 1963. On September 19th, 1963, Mr. Justice White further extended the time to file the Petition for Certiorari to and including October 25th, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. **Whether It Is Constitutionally Permissible for a United States Attorney to Personally Prosecute His Former Clients in a Federal Criminal Case.**
2. **Whether a Non-Indigent Accused in a Federal Criminal Case Has an Absolute Constitutional Right to Compel a Prosecuting Attorney and a Deputy Clerk to Be Sworn As Witnesses and Respond to Questions.**
3. **If the Right of a Non-Indigent Accused to Compel the Testimony of Witnesses in a Federal Criminal Case Is Not Absolute, What Are Appropriate Standards for Its Discretionary Control?**
4. **Whether Evidence Which Is Confidential under 7 U.S.C. 1373(c) and Which Was Obtained by the Prosecution in Violation of 18 U.S.C. 1905 May Be Used Against a Defendant in a Federal Criminal Case.**

QUESTION TO BE PRESENTED IF CERTIORARI IS GRANTED

5. Whether the Evidence Is Constitutionally or Legally Sufficient to Support the Verdict.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are in their pertinent parts reprinted herein at App. D. *infra*, and are listed below as follows:

United States Constitution, Amendment V.
United States Constitution, Amendment VI.
7 U.S.C. 1373(c).
18 U.S.C. 1905.

STATEMENT OF THE CASE

Petitioners, who are brothers, principally engaged in farming in McKenzie County, North Dakota, were accused under a multi-count indictment filed in the District of North Dakota on October 24th, 1960. Each of the first three counts of the indictment charged both Petitioners with conspiracies committed in violation of 18 U.S.C. 371. The fourth count of the indictment charged the Petitioner Loren R. Gajewski alone with a substantive offense. Count One *charged* Petitioners with conspiring to impede and obstruct the Agricultural Adjustment Act of 1938 by making false representations in violation of 18 U.S.C. 1001. Count Two charged Petitioners with conspiring to violate the Social Security Act. Count Three charged Petitioners with conspiring to violate 18 U.S.C. 1001 by filing false income

tax returns. Count Four charged Petitioner Loren R. Gajewski with making false statements in his 1959 income tax return in violation of 18 U.S.C. 1001 (See App. A, pp. A1, A2, A3). Petitioners were acquitted of the charge under Count Two, but convicted on each of the other counts in the indictment and were each sentenced to terms of two years imprisonment under each count to be served concurrently.

During the trial, Petitioner Loren was represented by employed counsel, but Petitioner Mervin, a lay person, represented himself. The prosecution was represented by Mr. John O. Garaas, United States Attorney for the District of North Dakota and Mr. Glen K. Swanson, Assistant United States District Attorney.

At one point in the trial, after the Government had rested its case in chief, the Defendant Mervin Gajewski called Mr. C. J. Schmidt, Deputy Clerk to the witness stand (T. 2212-3) At that point the Court told Mervin Gajewski to indicate the general line which Mr. Schmidt's testimony would take (T. 2212-5). Mervin Gajewski then told the Court that his purpose was to have the Clerk produce some records from a civil action (T. 2212-8), that the civil actions concerned identical material to that in the criminal case and that there were certain interrogatories involved which were needed by the defense (T. 2213-15). The United States Attorney objected that the material sought was immaterial, irrelevant and prejudicial and because he felt "that this (to have the Clerk testify) would be irregular" (T. 2213-5). The Court then stated its ruling which upheld the objection of the United States Attorney and refused to allow the Defendants to call Mr. Schmidt as a witness on the grounds that "what's the civil file in this matter of a civil case would not be admissible on this hearing as not being material and relevant" (T. 2213-21, 22). Mer-

vin Gajewski was then directed to proceed and was asked the name of his next witness (T. 2213-25).

Thereafter, Petitioners attempted to call as a witness on their behalf, the United States Attorney who was present in court (See App. E, *infra*, for the entire record excerpts concerning this matter). When the Court inquired the purpose of this, it was told that the testimony was necessary "to make a proper defense". The Court was further informed that the prosecutor had "been involved with these lands in question and with the people in question." The Court denied the request and subsequently the Court's ruling was challenged and Petitioners' further efforts to explain were cut off by the Court although it was stated by Petitioner that one reason for calling the prosecutor was that the United States Attorney had had conversations with Petitioners prior to the time he took office and at that time he was neighbor of the Petitioners and that he obtained confidential information making it easier for him to prosecute the case. Then the United States Attorney volunteered and was permitted by the Court to state his version of the conversation he had had. He did not, however volunteer to the Court that he had previously acted as Petitioners' attorney. He disclosed those facts for the first time on appeal. The Court of Appeals however, went outside the record to accept the United States Attorney's account of his representation of Petitioners. The Petitioners were never afforded an opportunity in court to contradict these extra-judicial findings (See App. F, *supra*, Petition for Rehearing).

At one point in its opinion, the Court of Appeals admits to going outside the record in accepting the United States Attorney's version of the affair (App. A, *infra*, p. A14, fn. 9). The Court of Appeals does not admit, but it is

nevertheless true, that their following language is completely without support or basis in the record on appeal:

> "Here Mr. John Garaas, the United States Attorney for the District of North Dakota, had represented the Appellants as a private attorney on only one occasion—an action in 1952, involving cancellation of oil leases on Appellants' land. It was not until July, 1961, that Mr. Garaas became United States Attorney, some eight months after the indictment in this case was returned." (App. A, *infra*, p. A11).

Under the indictment, Appellants were charged with the crime of conspiring to defraud the United States by "impeding, obstructing and attempting to defeat the lawful operation of an Act of Congress and the intent and purpose thereof, to-wit: The Agricultural Adjustment Act of 1938 as amended and supplemented (U.S.C.A. 1281 *et seq.*) and to commit certain offenses against the United States in violation of said Agricultural Adjustment Act of 1938 aforesaid and rules and regulations promulgated thereunder and in violation of Section 1001 of Title 18, U.S.C." With regard to this charge the United States Attorney claimed in his opening statement that he would show that there were two farms involved which were operated as a unit, one of which was registered with the McKenzie Agricultural Stabilization Conservation Committee and the other which was not (T. 22-11, 13). He said that he would show that Defendants sold approximately 10,000 bushels of wheat from one farm under the marketing card of the other illegally (T. 23-17). The United States Attorney said he would show by "self-made statements" by the Defendants the foregoing (T. 23-9). Furthermore, the prosecutor said that he would show the Defendants raised wheat in total disregard of the program and produced in excess of the acreage allotment as given by the County Committee from

the ASC Office of McKenzie County (T. 25-4), and that the ASC Office did not discover until 1957, that the Defendants were operating illegally (T. 24-7).

It became clear during the course of the trial that the United States Attorney intended to prove these charges against the Appellants by making extensive use of records of the McKenzie County ASC Committee maintained and kept by them in the ordinary course of business. During the course of the trial, 229 exhibits were offered by the Government and received into evidence (T. Index J to Z). The first 54 exhibits (through 55 inclusive less Exhibit 5), of the Government's exhibits were taken from the files and records of the McKenzie County ASC Committee (T. Index J through M), and in addition, Exhibits 212, 213, 223, 224, 225, 226, 227 and 228 (T. Index Y-13), making a total of 58 exhibits which were taken from the files and records of the ASC Office. The Court was of the view that the ASC records were admissible under the provisions of Section 1732, 18 U.S.C. and Section 1733, 18 U.S.C. (T. 87-15).

All of the foregoing exhibits were admitted into evidence through the testimony of Agricultural Department employees, or rather Agricultural Stabilization Conservation Committee employees. It was clear from all of the evidence elicited that the ASC records contained data "reported to or acquired by the Secretary (of Agriculture)." The ASC records produced many exhibits specifically provided for under Title 7, Section 1373(b), including "report of acreage" (Government Exhibits 1, 7, 8, 38, 46 and 48), "wheat record and report" (Government Exhibits 22, 23, 25, 43 and 225), "record of wheat sales" (Government Exhibit 34). Additionally there were items of personal correspondence by the Defendants (Government Exhibits 15, 24, 32, 44, 53 and 54).

There was no proof or evidence offered during any part of the trial that the data reported acquired by the County ASC Office, which was involved in the aforesaid exhibits, had been deemed by the Secretary of Agriculture to be relevant.

REASONS FOR GRANTING THE WRIT

The case is important. The case is especially important because of the unwarranted qualification upon the Sixth Amendment rights of a non-indigent accused to compel the testimony of witnesses on his own behalf. In this case, the Defendants called as witnesses on their behalf, the Deputy Clerk of the Court and the United States Attorney. Both of these individuals were present in the Courtroom throughout the trial, and the prosecutor did have an assistant with him in court. The announced purpose of calling the Deputy Clerk was to have him identify records in a civil case which involves some of the same fact questions present in this matter. The trial court made an advance determination of relevancy of these documents without ever seeing them and refused to allow the Deputy Clerk to be sworn upon objection by the United States Attorney. The Court also made certain inquiries of the Defendants concerning their reason for wanting the United States Attorney to testify. Representations were made to the Court in that he was important to the defense and that he had had dealings with these Defendants, was acquainted with some of the matters in the case and was necessary to the defense, and further that there had been a conversation between them prior to the time that the United States Attorney took office. The Defendants told the Court that the United States Attorney "got some confidential information that may make it easier to prosecute this case". The United States Attorney disclaimed such knowledge to the Court and his unsworn state-

ment in that regard was accepted by the Court who refused to permit him to be sworn as a witness.

It is the position of the Petitioners that they had an absolute right under the Sixth Amendment to compel testimony on their behalf. Opposed to this view, the Government contended that the Sixth Amendment was not applicable because no subpoena had been issued for the witnesses and that this was simply a matter of the trial court exercising its authority and duty to conduct the trial in an orderly manner, and keep immaterial matters out of the record (App. A, p. A12). Because these witnesses were present in Court, it was not necessary to issue subpoenaes for them; *Howson* v. *Marlene Blouse Corp.*, 106 N.Y.S. 2d 774, 200 Misc. 242 (1951). The rights of accused under the Sixth Amendment to compel the attendance of witnesses, would mean very little if as held by the courts below, witnesses could be compelled to attend court but could be prevented by the court from testifying. The position of the Petitioners in this matter is identical to that announced by the Court in *United States* v. *Seeger*, 180 F. Supp. 467 (S.D. N.Y. 1960). That case held that it was for the defendant to choose who his witnesses would be and that the materiality of the witnesses' proferred testimony must rest with the trial judge after the witness has been sworn, questions asked and objections made. This is to say that the accused under the Sixth Amendment is not required to make some sort of an offer of proof prior to the time he calls the witness to the stand. His right to place the witness on the stand and ask questions, is absolute. If proper objection is noted to the question, the matter has then reached the evidentiary stage where an offer of proof or some other showing of relevancy might be required. If the position of the trial court were to be sustained here, then the lower courts would have full license to require de-

fendants to give the prosecutor a preview of the defense evidence.

On this point, the lower court relied upon just three cases and they are distinguishable. It does not appear that this court has ever passed upon the question. *May* v. *United States*, 175 F.2d 994 (D.C. Cir. 1949), is distinguishable because the witness in that case was the Secretary of State of the United States and he was not present in court. The other case relied upon by the lower court was *Overholser* v. *DeMarkos*, 149 F.2d 23 (D.C. Cir. 1945), which is inapplicable because it was a civil proceeding in which the litigant was not an "accused" within the meaning of the Sixth Amendment. The lower court also placed some reliance upon *Fisher* v. *United States*, 231 F.2d 99 (9th Cir. 1956), which is inapplicable because the decision on this point was dictum, the prosecutor was called for impeachment purposes only and it was clear on the record that his testimony would not serve that purpose, it did not appear that a right under the Sixth Amendment was claimed and Fisher was awarded a new trial.

Even if it can be said that the right of an accused to compel the attendance and testimony of witnesses under the Sixth Amendment is a qualified one, there is a need for this court to impose proper standards for the exercise of that discretion. *Overholser* v. *DeMarkos, supra*, does this for civil cases, but even by those standards, the Court in this case clearly abused its discretion. Overholser indicates that it is the witness who is to protest if he cannot give relevant information. When the witness makes such a showing, then the court should require a statement from the party who calls him, disclosing what evidence is expected to be obtained. If the witness can give no relevant testimony, the court need not require his attendance, but in exercising its discretion, the court is required to resolve all

doubts in favor of the party calling the witness and failure to inquire into the matter where a showing is made that a person has no relevant testimony to give is an abuse of discretion. The discretion sanctioned by the lower court here was particularly poor because it did not even measure up to the standards imposed for civil cases by Overholser. Surely in a criminal case where an accused has rights under the Sixth Amendment, the standards ought to be higher. The trial court should have at least looked at the exhibits which the defendants sought to introduce through the Deputy Clerk. The mere fact that they were from a civil file did not make them inadmissible and as a matter of fact, several of the Government exhibits were from civil files (Exhibits 65, 66, 67, 68, 69 and 70). The trial court made no independent inquiry either into the natter of exhibits or the matter of the prosecutor's testimony. The court relied exclusively upon the unsworn statements and representations of the United States Attorney.

The Petitioners here are not indigent and the problem presented is not one under Rule 17(b) of the Federal Rules of Criminal Procedure involving the possible unwise expenditure of public money in connection with the subpoena for witnesses at Government expense. Here the problem is, does a non-indigent accused in a federal criminal case, have an absolute right to compel witnesses to take the stand, be sworn, and, have questions propounded to them. If not, then it is for this Court to establish the standards by which those Sixth Amendment rights may be qualified.

In this case it was charged that the United States Attorney had gotten confidential information from the Defendants prior to the time he took office. He later admitted on appeal, although he did not disclose it to the trial court, that he had in fact acted as petitioners' attorney at a time

prior to taking office. His representation of that relationship however, was that it was completely innocuous and non-prejudicial to the Petitioners. The Petitioners have never had an opportunity to refute those representations in court. The Court of Appeals went outside the record to accept the statements of the United States Attorney (See p. 5 of this Petition). The trial court prevented the Petitioners from questioning the United States Attorney under oath and accepted his word as against the word of Petitioners.

Beyond the fact that Petitioners were prevented by the Court from placing the prosecutor on the witness stand, there is an extremely important public policy question involved here. That is, should a United States Attorney be permitted to *personally* prosecute his former clients. The lower court said yes because it found there was no substantial relationship between the matters involved in the prosecution and the United States Attorney's former representation of Petitioners. Petitioners claim that he obtained confidential information and they were never permitted to interrogate the United States Attorney under oath concerning the matter. Apart from this claimed breach of confidentiality, there is the matter of fidelity required of all lawyers to their former client. See *Packer* v. *Rapoport*, 88 N.Y.S. 2d 118, reversed on other grounds 275 App. Div. 820, 89 N.Y.S. 2d 703 (1949), and Canons 6 and 37 of the American Bar Association Canons of Ethics. The United States Attorney here had assistants, one of whom was in court and any of whom could have prosecuted the case. Not only does the fair administration of federal criminal justice require that no United States Attorney personally prosecute his former clients, but the appearance of fairness, which is so essential to our judicial systems, also demands it.

The case is also important because of the fact that the Defendants were convicted upon evidence which was confidential under 7 U.S.C. 1373(c) and obtained by the Government in violation of 18 U.S.C. 1905.

Under Title 7, Section 1373, U.S.C.A., farmers engaged in the production of wheat for market are required to furnish proof of their acreage, yield, storage and marketing in the form of records, marketing cards, reports, storage under seal and such other things as the Secretary of Agriculture may prescribe. These reports and records were filed by the farmers with their local County Agricultural Stabilization Conservation Committee. These records are required to be kept confidential under Title 7, Section 1373(c), U.S.C.A., which provides as follows:

> "All data reported to or acquired by the Secretary pursuant to this section shall be kept confidential by all officers and employees of the Department, and only such data so reported or acquired as the Secretary deems relevant shall be disclosed by them, and *then only in a suit or administrative hearing* under this chapter." (Emphasis supplied).

Of the sixty-two Government exhibits above indicated which were taken from files and records of the ASC Committee, none were shown to have been deemed "relevant" by the Secretary. This case of course, was a criminal prosecution and was not a "suit or administrative hearing under this chapter" (Title 7). It should be noted that of the Government exhibits referred to above are actually of the type specifically designated in 28 U.S.C. 1373(b) (See Statement of the Case).

The question thus presented is one of great importance to the thousands of people who must operate under the Agricultural Adjustment Act of 1938, and insofar as we are aware, the claim made herein has never before been ad-

judicated. Perhaps because of the historic independence of American farmers, Congress has always been reluctant to impose criminal sanctions upon them through agricultural controls. It is true that there are some criminal sanctions to be found in Title 7, U.S.C., but they are wholly inapplicable to the problem here. In this case, the Government did by indirection what it could not have done by direction. Disclosures required to be made by wheat farmers to the Agriculture Department are as indicated, confidential unless deemed relevant by the Secretary and in that case they can only be used in a suit or administrative hearing under Title 7. Here the records were used to convict the Defendants for crimes under Title 18. These records could only have been obtained by the Government prosecutor in violation of the statute making them confidential and in violation of Title 18, Section 1905.[1] No consent to the use of those records before the grand jury returned the indictment or the trial itself was ever given by these Petitioners. Without these records, Petitioners could not have been convicted.

In *McNabb* v. *United States*, 318 U.S. 332, this court held that when the F.B.I. violates the statute requiring them to bring arrested persons immediately before the United States Commissioner, the conviction must be set aside when based upon evidence obtained in violation of that statute. In *Mallory* v. *United States*, 354 U.S. 449, another conviction was set aside on the grounds that it was obtained by federal officers acting in violation of the Federal Rules of Criminal Procedure. The situation here seems substantially comparable. Congress has declared that the records which it requires wheat farmers to fur-

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1. The Court of Appeals refused to recognize Petitioners' claim that the evidence was illegally obtained by the prosecutor (App. C, *infra*).

nish to the Department of Agriculture be confidential. It further makes it a misdemeanor for government agents to disclose such information, and yet the information was disclosed by the Department of Agriculture in this case to the prosecutor who presented it to the grand jury and later to the Court and jury which convicted the Petitioners. This Court ought to say that such frustration of Congressional intent can not be tolerated, that convictions cannot be obtained by violating federal statutes.

CONCLUSION

For all the foregoing reasons stated, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

FRANCIS BREIDENBACH,
Attorney for Petitioners.

October, 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17,079

Loren R. Gajewski and Mervin A. Gajewski,
Appellants,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the District of North Dakota.

[July 26, 1963.]

Before JOHNSEN, Chief Judge, MATTHES, Circuit Judge, and GIBSON, District Judge.

MATTHES, Circuit Judge.

Loren R. Gajewski and Mervin A. Gajewski, appellants, are brothers (42 and 36 years old, respectively,) and are the children of Otto A. Gajewski, who died in 1959, and Lillia B. Gajewski, who died in 1961. At all times pertinent to this proceeding appellants were engaged principally in farming in McKenzie County, North Dakota.

In three counts of an indictment filed October 24, 1960, appellants were charged with committing conspiracies in violation of 18 U.S.C.A. § 371.[1] In the fourth count of the indictment Loren R. Gajewski was charged with a substantive offense.

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1. 18 U.S.C.A. § 371 provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any pur-

In summary, Count One alleged that on or about June 22, 1954, prior thereto and continuing thereafter, appellants unlawfully conspired and confederated together and with Otto A. Gajewski, to defraud the United States by impeding, obstructing and attempting to defeat the operation of the Agricultural Adjustment Act of 1938, as amended, (7 U.S.C.A. § 1281, et seq.) and to commit certain offenses against the United States in violation of said Act and the rules and regulations promulgated thereunder, and in violation of 18 U.S.C.A. § 1001.[2] More specifically, the indictment alleged that, pursuant to the conspiracy, a tract of land designated as the "Home Farm," owned in part by Otto A. and Lillia B. Gajewski and in part by Loren R. Gajewski, was registered and operated in accordance with the Act, and that wheat allotments were assigned and wheat marketing cards properly issued for this farm. It was additionally alleged, however, that another tract of land designated as the "South Farm," first partially owned and later fully owned by appellants, was illegally operated by them free of the restrictions imposed by the Act. Explicitly, Count One charged that in furtherance of the conspiracy, and in violation of the Act and its attendant rules and regulations, appellants failed to register the South Farm, failed

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pose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both. * * *".

2. 18 U.S.C.A. § 1001 provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, * * * shall be fined not more than $10,000 or imprisoned not more than five years or both."

to procure wheat allotments for it, but nevertheless annually harvested wheat from approximately 200 acres of the South Farm during the years of the conspiracy and marketed such wheat by use of the marketing card issued for the Home Farm.

In Count Two appellants were charged with conspiring to violate the Social Security Act, but inasmuch as appellants were acquitted of this alleged offense, further reference to this count of the indictment is unnecessary.

Count Three alleged a conspiracy under 18 U.S.C.A. § 371, *supra*, to commit an offense against the United States in violation of 18 U.S.C.A. § 1001, *supra*. The gravamen of this count is that during March, 1955, prior thereto and continuing through 1959, appellants, in furtherance of their scheme and with Lillia B. and Otto A. as co-conspirators, filed income tax returns in the name of Otto A. Gajewski for the years 1951 through 1958 in which Otto A. falsely and fraudulently claimed Loren R. as a dependent for each of said years and Mervin A. as a dependent for each of the years except 1951. Additionally, it was alleged that during the early part of 1960, appellants, with their co-conspirator, Lillia B., filed an income tax return for 1959 in the name of L. B. Gajewski in which appellants were falsely and fraudulently claimed as her dependents.

As noted, the fourth count was directed solely against Loren R. Gajewski, and charged him with making false, fraudulent and fictitious statements in his 1959 income tax return, in violation of 18 U.S.C.A. § 1001, *supra*.

Loren and Mervin were found guilty on Counts One and Three, and Loren was found guilty on Count Four. Each was sentenced to imprisonment for a term of two years on Counts One and Three, the terms to be served con-

currently, and Loren was sentenced to a term of two years on Count Four, to be served concurrently with the sentence imposed on Counts One and Three.

During the trial, Loren was represented by employed counsel but Mervin, although financially able and fully aware of his right to counsel, understandingly chose to represent himself. It is manifest that Mervin actively participated in every phase of the proceeding.

At the close of the Government's case and again after all of the evidence was in, separate motions for judgment of acquittal were filed and denied. One of the contentions here urged is that there is no substantial evidence in the record to support the verdicts of guilty and that the motions for judgment of acquittal were erroneously denied.

The rather voluminous record consists almost entirely of evidence offered by the Government. Although appellants did not testify and only four witnesses were offered in their behalf, the nature and theory of appellants' defense, directed in the main to the first count, is readily apparent from the numerous pretrial motions filed by them and from Mervin's cross-examination of Government witnesses. In summary, appellants' position was that the Agricultural Adjustment Act is unconstitutional; that it was communistically inspired and that they had the untrammeled right to operate their farm free of Government restrictions and controls.[3]

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3. Mervin, openly defiant to and uncooperative with the administrative officials legally designated to carry out the farm program, filed numerous pretrial motions challenging virtually every aspect of the case against him. Typically, in a Motion to Challenge Jury List, Mervin attacked a juror on the ground that the juror would be "prejudiced in favor of the communistic Agricultural Adjustment Act of 1938 and would therefore be very unlikely to render any verdict not in conformity with the agrarian policies of the Communist Party U.S.A. and said agrarian policies being represented in the aforesaid Act."

In examining the record and upon considering the evidence, virtually uncontradicted, we are of the view that there was substantial competent evidence to support the conviction of both appellants under Counts One and Three, and Loren's conviction under Count Four. Even if it were not so, we are required to affirm if the evidence was sufficient to sustain the conviction under any count, since concurrent terms of imprisonment were imposed whereby each appellant received a total sentence of two years, a sentence which did not exceed that which might lawfully have been imposed under any single count. (Fine of $10,000 and five years' imprisonment or both. 18 U.S.C.A. § 371; 18 U.S.C.A. § 1001). *Barenblatt* v. *United States*, 360 U.S. 109, 115 (1959); *Abrams* v. *United States*, 250 U.S. 616, 619 (1919); *Burger* v. *United States*, 8 Cir., 262 F.2d 946, 954 (1959), cert. denied, 359 U.S. 990 (1959); *Bunn* v. *United States*, 8 Cir., 260 F.2d 313, 315-316 (1958); *Williams* v. *United States*, 8 Cir., 260 F.2d 125, 131-132 (1958), cert. denied, 359 U.S. 918 (1959).

In view of the foregoing rule and the overwhelming evidence of guilt under Count Three, our discussion of the evidence will be limited to that count.

In May, 1955, pursuant to a prior conference with an Internal Revenue Agent, appellant Loren R. Gajewski presented to the agent income tax returns purporting to show farming operations and income tax liability of Otto Gajewski for the years 1951, 1952 and 1953. Returns had not previously been filed by Otto or Lillia for said years.[4]

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4. Neither appellant filed a return for the years 1951 through 1958 although the Government's evidence showed they had gross income for each of said years in an amount requiring the filing of a return. Loren filed a return for the year 1959, which, as noted, is the subject of Count Four of the indictment.

In the 1951 return Loren and Arden Gajewski, another adult son of Otto A. and Lillia B., were listed and claimed by Otto as dependents. In the 1952 return, Loren, Mervin and Arden were claimed as dependents and in the 1953 return, Loren and Mervin were so claimed. During the interview with the agent, Loren admitted that he had prepared the 1951, 1952 and 1953 returns for his father. For the years 1954 through 1959, returns were filed in which both appellants were claimed as dependents.[5]

By claiming appellants as dependents, Otto and Lillia were able to avoid the tax liability which would have been imposed if the reports had not falsely and fraudulently shown that appellants were dependents of the taxpayers.

Under the 1954 Internal Revenue Code, 26 U.S.C.A. §§ 151, 152, a child of a taxpayer may be claimed as a dependent if he has received over half of his support from the taxpayer for the calendar year in which the taxable year of the taxpayer begins, and if either the child has not attained the age of 19 years, or has a gross income for the year of less than $600. See also, Internal Revenue Code, 1939, 26 U.S.C.A. § 25. Here it was conclusively established that appellants, adult individuals who were actively and extensively engaged in farming operations and who also received other income, had gross income far in excess of $600 in each of the taxable years in question, and neither received more than half of his support from his parents.

There was also evidence in abundance from which the jury could find that appellants had unlawfully entered

5. In 1951 Otto was over 65 years of age and since his spouse was also a dependent, he claimed credit for a total of five dependents. In 1952 Lillia was also over 65 and credit was taken for seven dependents; in 1953 through 1959 credit was taken for a total of six dependents.

into a conspiracy to cause the false and fraudulent tax returns to be filed on behalf of Otto and Lillia. An expert Government witness testified that the same typewriter had been used to prepare all of the questioned returns. It stands undisputed that Loren prepared the returns for his father for 1951, 1952 and 1953. It was shown that Mervin was present on one of the occasions when the Internal Revenue Agent had a conference with Loren in regard to the filing of the returns. Additionally, the evidence supports an inference that Mervin was the moving and dominating influence in the activities and conduct of appellants which culminated in the returning of the indictment.

As is typical of conspiracy prosecutions, the evidence to establish the conspiracy was largely circumstantial, but, as we observed in *Isaacs* v. *United States*, 8 Cir., 301 F.2d 706, 724 (1952), cert. denied, 371 U.S. 818 (1962):

> "A fraudulent scheme and conspiracy may be and usually is established by circumstantial evidence; by inferences from the evidence of relationship of the parties and by overt acts, conduct and other probative circumstances." (Citing cases).

In summary, the evidence to support all elements of the third count was very persuasive, and the submission of the count to the jury and the resultant verdicts of guilty were fully justified.

A point raised by appellants in their initial brief, unsupported by any authority and seemingly raised as an afterthought, is that Count Four of the indictment, said to be "clearly an Income Tax case" and lodged only against Loren, was improperly joined with the conspiracy counts instead of being "separated and left alone to stand on its own feet." Even if the indictment were vulnerable to attack for misjoinder of offenses and defendants—a

viewpoint we find untenable—the proper remedy, not pursued by appellants, would have been a motion for severance or for a separate trial under Rule 14, Fed. R. Crim. P. *Kleven* v. *United States*, 8 Cir., 240 F.2d 270, 272 (1957); *Finnegan* v. *United States*, 8 Cir., 204 F.2d 105, 109 (1953), cert. denied, 346 U.S. 821 (1953); *United States* v. *Goodman*, 5 Cir., 285 F.2d 378, 379 (1960), cert. denied, 336 U.S. 930 (1961); *United States* v. *J. Tirocchi & Sons, Inc.*, D. R.I., 187 F. Supp. 778, 780 (1960). Nevertheless, we have considered the merits of the contention for the purpose of determining whether there was a misjoinder requiring the court, *on its own initiative*, to invoke Rule 14 and thereby order an election or a separate trial of Count Four, or grant a severance. Compare *Kansas City Star Co.* v. *United States*, 8 Cir., 240 F.2d 643, 651-653 (1957), cert. denied, 354 U.S. 923 (1957), and *Malatkofski* v. *United States*, 1 Cir., 179 F.2d 905, 909 (1950) [cases emphasizing trial courts' discretionary power to deny motion for severance], with *Ingram* v. *United States*, 4 Cir., 272 F.2d 567 (1959) [no discretion to deny severance where multiple defendants are charged with offenses in no way connected]. See also, *United States* v. *Harvick*, D. N.D., 153 F. Supp. 696 (1957). Upon reasonable consideration of the indictment in its entirety, we conclude that it satisfies the requirements of Rule 8, Fed. R. Crim. P.,[6] and that appellants were in no respect prejudiced by

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6. In summary, Rule 8(a) provides that separate offenses may be charged in separate counts of a single indictment if they are of similar character or are based on the same act or transaction or upon transactions which are connected or that constitute a common scheme or plan.

Rule 8(b) provides, in substance, that several defendants may be charged together or separately in one or more counts of a single indictment if the defendants are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

the joinder of the offenses and the joint trial. See, *Kleven* v. *United States, supra*, 240 F.2d 270; *Robinson* v. *United States*, D.C. Cir., 210 F.2d 29 (1954); *United States* v. *J. Tirocchi & Sons, Inc., supra*, 187 F. Supp. 778; *United States* v. *Bachman*, D.D.C., 164 F. Supp. 898 (1958); *United States* v. *Welsh*, D.D.C., 15 F.R.D. 189 (1953), affirmed, 220 F.2d 200 (1955).

Without having properly objected at the trial and without having raised the point in their initial brief on appeal, appellants contend for the first time in their supplementary brief that certain records reported to or acquired by the Secretary of Agriculture were illegally obtained by the prosecution and improperly admitted in evidence in violation of Title 7, U.S.C.A. § 1373(c).[7] The records, apparently maintained in the McKenzie County Agricultural Stabilization Conservation Office, related primarily to registration and operation of the South Farm under the Act, and were introduced in evidence as to Count One. Diligent search of the record discloses that although objections were made to the introduction of some of the questioned records, there was not even the slightest suggestion, much less an objection, by either appellant that the records were inadmissible because of the above-mentioned statute. Under familiar rules we, as a reviewing court, are not required to consider or review actions of omission or commission by the trial court unless the complaining party made known to that court "the action which he desires the court to take or his objection to the

7. Title 7, U.S.C.A. § 1373(c) provides:

"All data reported to or acquired by the Secretary pursuant to this section shall be kept confidential by all officers and employees of the Department, and only such data so reported or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing under this chapter."

action of the court and the grounds therefor." Rule 51, Fed. R. Crim. P.; *Litton* v. *United States*, 8 Cir., 177 F.2d 416, 418 (1949), cert. denied, 339 U.S. 921 (1950); *United States* v. *Miller*, 6 Cir., 316 F.2d 81, 83 (1963); *Swift* v. *United States*, 10 Cir., 314 F.2d 860, 862 (1963); *White* v. *United States*, D.C. Cir., 314 F.2d 243, 245 (1962); *Landers* v. *United States*, 5 Cir., 304 F.2d 577, 578-579 (1962).

But quite apart from the question of reviewability, we further note that even if it be assumed that the statute relied upon is an absolute bar to introduction of the records in this criminal proceeding—a question we need not and do not decide—the alleged error in admitting the records was not prejudicial. For despite appellants' efforts on appeal, they have been unable to demonstrate that the records, though primarily introduced in support of Count One, actually supported and led to their convictions under the other counts as well. As previously demonstrated, there was ample evidence of appellants' guilt under Count Three, independent of the records, which at the most, were merely cumulative evidence as to this count and in nowise led to the convictions thereon. *Williams* v. *United States*, *supra*, 260 F.2d 125, 131-132; *United States* v. *Miller*, *supra*, 316 F.2d 81, 83. Therefore, again as indicated previously, since the sentences imposed do not exceed the maximum authorized as punishment for the offense charged in Count Three, we need not consider what effect, if any, admission of the records, even if improper, had upon the other counts.

In their supplementary brief, appellants, once again for the first time on appeal, assert that they were denied a fair trial by reason of having been prosecuted by their former attorney. While we might have been justified in refusing to consider this contention since concededly ap-

pellants made no objection on this ground in the trial court, we nevertheless have given it careful scrutiny.

Certainly it would be improper for a United States district attorney to prosecute a defendant on the basis of facts wholly or partially acquired by the prosecutor through prior professional relations as the accused's private attorney. 7 Am. Jur. 2d, Attorneys at Law, § 158; 5 Am. Jur., Attorneys at Law § 66; 27 C.J.S., District & Pros. Attys., § 12(6)(c). But equally as certain, according to the same authorities, the mere fact that a prosecuting attorney previously represented an accused in a civil matter does not ipso facto require disqualification of the attorney in the criminal proceeding. If there is no substantial relationship between the former civil representation and the present criminal prosecution, and if the prosecutor will not be called upon to use against his former client any confidential knowledge gained through their former association, no prejudice will result to the accused. See Annot., 52 A.L.R. 2d 1243, 1262 (1957); *Marco* v. *Dulles*, S.D. N.Y., 169 F. Supp. 622 (1959); *United States* v. *Standard Oil Company*, S.D. N.Y., 136 F. Supp. 345 (1955).

Here, Mr. John Garaas, the United States Attorney for the District of North Dakota, had represented appellants as a private attorney on only one occasion—an action in 1952 involving cancellation of oil leases on appellants' land. It was not until July, 1961, that Mr. Garaas became United States Attorney, some eight months *after* the indictment in this case was returned. Careful examination of the transcript and the briefs convinces us beyond a doubt that in prosecuting appellants, Mr. Garaas violated neither the letter nor the spirit of the Canons of Professional Ethics, and that his prior representation of them in no degree deprived appellants of a fair trial. Indeed,

appellants did not object to the appearance of Mr. Garaas for the prosecution at the time of trial, have failed in this court to demonstrate that Mr. Garaas acquired confidential information during his representation of appellants that was pertinent to the prosecution, and have shown no conceivable manner in which his participation in the trial could have been prejudicial to them.

Appellants further contend that the court erred in refusing to permit them to call as witnesses the Deputy Clerk of Court and the United States Attorney who prosecuted the case against them.[8] Basic to appellants' argument is their belief that the Sixth Amendment right "to have compulsory process for obtaining Witnesses" prohibits, absolutely and virtually without exception, a court from refusing to permit persons to be called by the defense to testify, to be sworn, and to have questions propounded to them. Opposed to this view, appellee (Government) contends that the provisions of the Sixth Amendment are wholly inapplicable; that no question is presented concerning appellants' right to have witnesses in their favor subpoenaed since no subpoenas were asked for and since both the Clerk and the United States Attorney were already present in the courtroom; and that the trial court properly exercised its authority and duty to conduct the trial in an orderly manner and to keep immaterial matters out of the record.

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8. Only Mervin Gajewski, conducting his own defense at the trial, attempted to call these witnesses, and in the first brief on appeal, objection to the lower court's refusal to permit the witnesses to testify was made on behalf of Mervin only. Subsequent briefs on appeal raise the point for both Mervin and Loren, claiming that Mervin was acting for both himself and Loren even though Loren had his own attorney. We have considered this assignment of error as to both appellants.

Review of the record reveals that appellants were properly apprised of their subpoena rights under the Sixth Amendment, and that, rather than being confronted with a Sixth Amendment issue, we are here presented with a question of the trial court's discretionary power to control the proceedings.

Generally, a trial court has wide discretion respecting examination of witnesses. *Brennan* v. *United States*, 8 Cir., 240 F.2d 253, 262 (1957), cert. denied, 353 U.S. 931 (1957); *London Guarantee & Accident Co.* v. *Woelfle*, 8 Cir., 83 F.2d 325, 334 (1936); *Burns* v. *United States*, 10 Cir., 286 F.2d 152, 157 (1961); *Sachs* v. *United States*, 9 Cir., 281 F.2d 189, 191 (1960), cert. denied, 364 U.S. 909 (1960); *Leathers* v. *United States*, 9 Cir., 250 F.2d 159, 164-165 (1957). More particularly, under appropriate circumstances, a court may refuse to even allow a witness to take the stand. *May* v. *United States*, D.C. Cir., 175 F.2d 994, 1010 (1949), cert. denied, 338 U.S. 830 (1949); *Overholser* v. *De Marcos*, D.C. Cir., 149 F.2d 23, 26 (1945), cert. denied, 325 U.S. 889 (1945). Courts are especially reluctant, and rightfully so, to allow lawyers, including prosecuting attorneys, to be called as witnesses in trials in which they are advocates. *Robinson* v. *United States*, 8 Cir., 32 F.2d 505, 510, 66 A.L.R. 468 (1928); *United States* v. *Clancy*, 7 Cir., 276 F.2d 617, 636 (1960), reversed on other grounds, 365 U.S. 312 (1961); *United States* v. *Alu*, 2 Cir., 246 F.2d 29, 33-34 (1957); 97 C.J.S., Witnesses § 113; Annot., 149 A.L.R. 1305. Although, as the above authorities indicate, such judicial discretion is generally exercised to prevent testimony by an advocate in *favor* of the party whom he represents, a court may, without abusing its discretion, refuse to allow the *defense* to call as a witness the United States Attorney trying the case. *Fisher* v. *United States*, 9 Cir., 231 F.2d 99, 104 (1956).

To be sure, an accused's right to call relevant witnesses and to prevent a complete defense may not be abrogated for the sake of trial convenience or for the purpose of protecting a United States Attorney from possible embarrassment while testifying, if he possesses information vital to the defense. But here, the trial court was fully justified in requiring appellant Mervin Gajewski to indicate in advance the general nature of the testimony he desired to elicit from both the Clerk and the United States Attorney, for Mervin had previously attempted to inject into the trial irrelevant, extraneous, and often inflammatory evidence, and had repeated such efforts despite court rulings prohibiting its admission. Mervin revealed that he wished the Clerk to identify the records in certain pending civil actions in which Mervin was involved—actions which the trial court then held to be irrelevant to the criminal proceeding. As to the United States Attorney, Mervin claimed that Mr. Garaas, prior to becoming prosecutor, had obtained confidential information material to the case in a conversation with Loren Gajewski. After hearing Mr. Garaas' account of the alleged confidential conversation, the trial court ruled that he could not be called to testify.[9] On this record, we would be unwarranted in holding that the trial court abused its discretion in refusing to allow the Clerk and the United States Attorney to be called as witnesses.

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9. At the trial, Mr. Garass stated in the record that the conversation concerned the pros and cons of the farm program generally, that the conversation was not material to the criminal proceeding, and that he had "no more knowledge of the fact than what is in the newspapers." Not in the record, but in the briefs on appeal, it was revealed that the conversation had occurred at a picnic in September, 1960, in the presence of others as well as Loren and Mr. Garaas.

Other contentions alleging various procedural errors have been carefully considered, and are wholly without merit. The assailed rulings on evidentiary matters were not prejudicial; certain instructions offered by appellants were properly refused either because they did not correctly declare the law or were covered by instructions given by the court. The record reveals that appellants' rights were zealously protected throughout the entire proceeding, and that nothing occurred which justifies the granting of another trial.

The judgments are affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,079. September Term, 1962.

Loren R. Gajewski and Mervin A. Gajewski,
Appellants,

vs.

United States of America.

Appeal from the United States District Court for the District of North Dakota.

This Cause came on to be heard on the record from the United States District Court for the District of North Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgments and sentences of the said District Court, in this cause, be, and the same are hereby, affirmed.

And it is further Ordered by this Court that the defendants in the said District Court, Loren R. Gajewski and Mervin A. Gajewski, do surrender themselves to the custody of the United States Marshal for the District of North Dakota, if not now in custody, in execution of the judgments and sentences imposed upon each of them, within thirty days from and after the date of the filing of the Mandate of this Court in the said District Court.

July 26th, 1963.

Order entered in accordance with Opinion:
/s/ Robert C. Tucker
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17079

September Term, 1962.

Loren R. Gajewski et al., Appellants,
vs.
United States of America.

Appeal from the United States District Court for the District of North Dakota.

There is before the Court appellants' petition for rehearing en banc and on consideration of such petition, it

is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

It is noted that the petition for rehearing contends that "In its treatment of the ASC records evidence the Court recognizes Appellants' claim that the ASC records were illegally obtained by the prosecution", but our opinion contains no such recognition.

August 26, 1963.

APPENDIX D

Constitutional Provisions and Statutes Involved

United States Constitution Amendment V:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law."

United States Constitution Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining Witnesses in his favor,"

7 U.S.C. 1373(c):

> "All data reported to or acquired by the Secretary pursuant to this section shall be kept confidential by all officers and employees of the Department, and only such data so reported or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing under this chapter."

18 U.S.C. 1905:

> "Whoever, being an officer or employee of the United States or of any department or agency thereof, * * * divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to * * * processes, operations, style of work, * * * identity, confidential statistical data, amount or source of any income, * * * shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment."

APPENDIX E

Record proceedings concerning petitioners' effort to call the prosecuting attorney as a witness are quoted as follows from transcript page 2214, line 2 through transcript page 2218, line 25:

"Mervin Gajewski: Your Honor, I'd like to call Mr. John Garaas to the stand.

The Court: Well, for what purpose do you want him; why do you want to call him? It is rather unusual to call one of the attorneys in the case. What do you wish to find out?

Mervin Gajewski: I need some of his testimony, Your Honor, and to make a proper defense this will be necessary.

The Court: Without showing why he is needed to the Court, the Court would not permit the attorney to be called to the stand in the case. The request is denied. Call your next witness.

Mervin Gajewski: Your Honor, Mr. Garaas has been involved with these lands in question and with the people in question. I think to clarify a few of the things I think it would be proper for him to answer them under oath.

The Court: The request is denied. Proceed. Call your next witness.

Mervin Gajewski: Your Honor, as we have other witnesses, we were to arrive here this morning, but I don't see them here at present.

The Court: Well, who were they, were they subpoenaed?

Mervin Gajewski: Well they were told to be here, yes.

The Court: They wouldn't have to accede to that. The only way you can make them come is by subpoena

Mervin Gajewski: It was voluntary, Your Honor.

The Court: Well, I mean that you are informed of the right to have the subpoena. Can you state in a general way what they were going to testify to, in connection with?

Mervin Gajewski: Your Honor, if you may reconsider again, Mr. Garaas is concerned with these lands and with these defendants and the, for a proper defense, I don't think it is, this is a criminal action, not a civil action. I don't know why these defendants should be denied the proper defenses.

The Court: There is no disposition on the Court. You have compulsory subpoenas, service to bring anybody in you wish. If you are without funds to bring them in, the Court will order them at no expense. There is no disposition on the part of anybody to deny any witnesses you want here that are relevant and material?

Mervin Gajewski: You mean, Your Honor, that we should subpoena Mr. Garaas?

The Court: No. You can't put Mr. Garaas on the stand with the showing that you have made. We don't need that. I thought you were talking about some other witnesses that you told to be here this morning that weren't subpoenaed. I informed you that earlier and I informed defendants earlier that they have subpoenas available to them to be served and that they didn't have money to pay for it you would have them at Government expense.

Mervin Gajewski: Your Honor, may we wait until this afternoon for our witnesses?

The Court: Well, I want to know what these witnesses are going to show, what you are asking for, why you are asking for a continuance, and you have to show that these witnesses will testify to something, who they were, who they are, and what they will testify about and some of the material. You may state their names and what you think they will testify to.

Mervin Gajewski: Your Honor, may I approach the bench?

The Court: No. You can speak out here because the jury isn't here.

Mervin Gajewski: Your Honor, the reason I want Mr. Garaas on the stand—

The Court: We have gone over that.

Mervin Gajewski: Please, exception.

The Court: That is not admissible under our—

Mervin Gajewski: It is this one reason. Mr. Garaas and Loren Gajewski had conversation concerning action of the Government against me before he was State's Attorney, U.S. Attorney, and as you know Mr. Garaas was a resident of McKenzie County and of Watford City which is a short distance from us, and those things are involved.

The Court: Well, you haven't stated any of the witnesses. You understand it is very unusual case for an

attorney in a case to be put on the stand. It's condemned unless you give him advance notice so he can withdraw or something that is material because a lawyer takes the witness stand and in that way argues his own credibility to the jury and that is rather unusual thing to do.

Mr. Garaas: If it please the Court, I would be willing to state into the record our conversations as I recall it.

The Court: What is it?

Mr. Garaas: It was simply a statement to the effect of the Indictment which had recently been rendered against them and as to this seriousness of the Indictment and that they contended as I recall, or he contended that it violated his rights in some way, and I believe we ended up stating that no person likes to have controls over him but that the farm program necessarily has to have controls in the interest of a regulated commerce for the benefit of the farmers, that it seeks to regulate, and that is about the size of it, Your Honor. I don't believe that that would be material at all to this lawsuit, as far as I can see, and that is the substance of the conversations.

Mervin Gajewski: Your Honor, Mr. Garaas got some confidential information that may make it easier to prosecute this case and through this conversation—

Mr. Garaas: Your Honor, I have nothing more, no more knowledge of the fact than what is in the newspapers.

The Court: Mr. Garaas may not be called."

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 581

LOREN R. GAJEWSKI AND MERVIN A. GAJEWSKI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1–A15) [1] is reported at 321 F. 2d 261.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1963. (Pet. A15–A16.) A petition for rehearing was denied on August 26, 1963 (Pet. A17), and on September 19, 1963, Mr. Justice White ex-

[1] The record filed in this Court consists of 14 volumes: Vol. I, entitled "Original File of Pleadings", consists of 306 pages and is referred to herein as "O.R."; Vols. II through XIII, which reflect the transcript of proceedings at the trial with pages numbered from 1 through 2393, is referred to herein as "R."; Vol. XIV, with pages numbered from 1 through 18, consists of the proceedings in the court below.

tended the time within which to file a petition for a writ of certiorari to October 25, 1963. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the District Court committed reversible error in not requiring the United States Attorney and the Deputy Clerk of the Court to be sworn as defense witnesses.

2. Whether petitioners are entitled to a new trial because the United States Attorney who tried the case for the government had represented them in an unrelated civil matter in 1952, although no objection was made in the District Court.

STATUTES INVOLVED

Title 18 of the United States Code provides:

> SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

SEC. 1001. STATEMENTS OR ENTRIES GENERALLY

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

1. On October 24, 1960, petitioners were indicted in the United States District Court for the District of North Dakota. Count I alleged that both before and after June 22, 1954, petitioners had conspired together and with their father (Otto Gajewski, who died in 1959) to commit certain offenses in violation of the Agricultural Adjustment Act of 1938, as amended (7 U.S.C. 1281, *et seq.*) and of 18 U.S.C. 1001, the general "false statements" statute (O.R. 1–4). Count II alleged that petitioners had conspired to violate the Social Security Act (O.R. 5–6). Count III alleged that petitioners had conspired together and with their parents as co-conspirators, during a period beginning prior to March 1955, and continuing until 1960, to violate 18 U.S.C. 1001 by (1) filing income tax returns in the name of Otto Gajewski for the years 1952 through 1958 in which both petitioners were falsely claimed as dependents for each year; (2) filing such a return for the year 1951 in which petitioner Loren

was falsely claimed as a defendant; and (3) filing an income tax return in the name of Lillia Gajewski for 1959 in which both petitioners were falsely claimed as her dependents. The indictment alleged that it was a part of the conspiracy that petitioners would fail to file income tax returns on their own behalf for the years 1951 through 1958 (O.R. 7–9). Count IV alleged that petitioner Loren Gajewski had made false and fraudulent statements in his 1959 income tax return in violation of 18 U.S.C. 1001 (O.R. 10).

After a jury trial lasting three weeks (R. 2374) the petitioners were convicted on Counts I and III and acquitted on Count II. Loren Gajewski was also convicted on Count IV (O.R. 294–300; R. 2371–2373). Loren was sentenced to concurrent two-year prison terms on each of the three counts on which he was convicted (O.R. 301) and Mervin was sentenced to concurrent two-year terms on each of the two counts on which he was convicted (O.R. 302). Because of the concurrent sentences, the court of appeals found it necessary to consider only Count III in affirming the convictions.

2. The evidence to support the verdicts of guilty on Count III may be summarized as follows:

During the 1950's Otto and Lillia Gajewski owned a 465-acre farm in McKenzie County, North Dakota. Their son Loren owned a 400-acre adjoining farm. These 865 acres were known as the "home farm." (Govt. Exs. 46, 71; R. 169–172.) Between the years 1951 and 1957 petitioners Loren Gajewski and his brother, Mervin Gajewski, had a two-thirds interest in another farm, about six miles south of the "home

farm," consisting of 519 acres and referred to throughout the trial as the "south farm."[2]

Until May 1955 none of the Gajewskis had filed income tax returns for the years 1951 through 1953. On February 10, 1955, Loren appeared at the office of a revenue agent in response to a request that he produce records relating to the income tax liability of himself and his father. No records were produced at that time nor at their subsequent meeting on May 24, 1955. At the latter meeting, however, Loren presented income tax returns in the name of his father, Otto, for the years 1951 through 1953. Loren was listed as a dependent on the 1951 return and both petitioners were listed as dependents in the 1952 and 1953 returns, all of which had been prepared by Loren (Govt. Exs. 110, 111, 112; R. 836–841, 853–854). The agent again discussed the matter with Loren in March 1957, advising him that he and Mervin would have to file individual income tax returns in their own names, and giving Loren the blank forms for that purpose. Mervin never did so, however, and Loren filed no returns until 1960 (after the death of his father), when he filed a tax return for 1959 showing a loss of $1.00 (Govt. Ex. 119; R. 843–845, 872).

No member of the Gajewski family paid any income tax to the United States for the years 1951 through

[2] The "home farm" had been issued a farm marketing card by the United States Department of Agriculture and was in compliance with the wheat acreage allotment program (R. 171–174, 182–188). No farm marketing card had been obtained for the "south farm." Count I involved whether the petitioners had marketed wheat grown on the "south farm" under the marketing card issued for the "home farm."

1959 (Govt. Exs. 110–119, inclusive; R. 844–845, 865–873, 1879). All of the returns filed by the father, Otto (1951 through 1958), and those filed by Loren and his mother for 1959, showed no tax due, although the government's evidence showed that during the years 1955 through 1959 the net worth of the family increased by an average of more than $11,000 per year (Govt. Ex. 233; R. 1867) and resulted in a combined tax liability of more than $6,700 for the petitioners (Govt. Ex. 234; R. 1876–1877). Both petitioners were claimed as dependents on the returns filed in the name of Otto for the years 1952 through 1958, and Loren was so claimed on the 1951 return (R. 865–873), although it is plain that neither qualified for the deduction for dependents.[3]

ARGUMENT

The court below held that there was substantial evidence to support the convictions of both petitioners on each of the counts on which they were convicted, but pointed out that since the prison terms are concurrent it was unnecessary to go beyond a consideration of the propriety of the convictions on Count III.

[3] Neither petitioner qualified in any year as a deductible "dependent" for tax purposes (Sec. 25(b) of the Internal Revenue Code of 1939 and Sections 151–152 of the Internal Revenue Code of 1954) because each had annual income in excess of $600, was not receiving most of his support from his parents, was over 18 years of age, and was not attending school (R. 1885–1886, 2272).

It should be noted that petitioner Mervin Gajewski was invariably listed on Otto's tax returns as a dependent under the name of Arthur Gajewski (Govt. Ex. 72; R. 866–871, 873, 1839).

(Pet. A5, A10.) The evidence of guilt on that count was, as we have shown, ample. Athough petitioners' income during the years 1955 through 1959 was large enough to result in a combined tax liability of more than $6,700, they filed no income tax returns (until Loren's non-taxable return for 1959 was filed). They were falsely listed as dependents on the non-taxable returns of their parents throughout the 1950's. This continuous course of conduct could not have been followed by accident or chance but only as the result of a long-standing agreement among the petitioners and their parents. It was this corrupt agreement which constituted the conspiracy alleged in Count III and which was established "overwhelming[ly]" (Pet. A5) by the evidence.

The two principal questions raised in the petition are (1) whether the United States Attorney and the Deputy Clerk of the District Court should have been sworn as defense witnesses, and (2) whether it was proper for the United States Attorney to "personally prosecute his former clients" (Pet. 2).

1. There is no merit in the argument (Pet. 8–11) that the trial judge erred in not requiring the Deputy Clerk or the United States Attorney to testify. A defendant has no absolute right to call as a witness anyone he wishes, regardless of the relevance of the testimony sought to be adduced. *May* v. *United States*, 175 F. 2d 994, 1010 (C.A. D.C.); *United States* v. *Alu*, 246 F. 2d 29, 33–34 (C.A. 2); *Fisher* v. *United States*, 231 F. 2d 99, 104 (C.A. 9). In particular, whether the defense should be permitted to call the United States Attorney as a witness is a matter within

the discretion of the trial judge. *United States* v. *Alu, supra,* pp. 33–34; *Fisher* v. *United States, supra,* p. 104.

In the present case, there was exceptional reason for the trial judge to inquire as to the relevance of the testimony to be elicited. Just before attempting to call the Deputy Clerk and the United States Attorney, Mervin Gajewski had examined his first witness, one Conitz, who identified himself as the President of the Farmers' Liberty League, a group which, said Conitz, was "organized to expose and oppose communism in agriculture and otherwise." (R. 2207) [*] The exchange between Mervin and Conitz consisted of a large number of questions as to patently irrelevant matters—objections to which were sustained—and some testimony by Conitz as to almost equally irrelevant matters regarding *his own* activities in farming and his association with the Farmers' Liberty League (R. 2197–2210). Judge Graven then excused the jury and asked Mervin what he proposed to prove by the testimony of Conitz. Mervin replied that he intended to show that the entire program of federal controls on agriculture was promulgated by communists and socialists in order to "completely socialize our free American agriculture * * *" (R. 2210–2211). The court then

[*] Before the trial Mervin Gajewski filed a "Motion to Challenge Jury List," alleging that certain members of the petit jury panel were in favor of the "communistic" Agricultural Adjustment Act (O.R. 110). Throughout the trial Mervin's principal contention was that he could not properly be convicted of the crime alleged in Count I because the Agricultural Adjustment Act is communistic and unconstitutional.

excused the witness on the ground that such testimony would be immaterial and irrelevant (R. 2211).

At this point Mervin called the Deputy Clerk to testify as to two civil actions involving Mervin's difficulties with the Department of Agriculture, because "there are certain interrogatories involved and we must have them."[5] This request was properly refused on the ground that such evidence was immaterial and irrelevant and the point was not pressed (R. 2212–2213). Mervin then called United States Attorney Garaas as witness and there ensued the colloquy set forth in the petition (pp. A18–A21). Since nothing in the colloquy explained the necessity for such an unusual step as requiring the government prosecutor to testify, denial of the request was properly within the discretion of the district court.

Finally, it seems rather clear that whatever Mervin hoped to established by these two witnesses would, at best, have gone only to Count I and could have had no bearing on Count III. There is even now no semblance of a showing that the testimony sought would bear in any way on the conspiracy to make false statements on Otto Gajewski's income tax returns.

2. Petitioners' argument (Pet. 11–12) that the United States Attorney should not have tried the case because he had obtained confidential information from them at some time in the past is also without merit.

[5] One of the suits appears to have been an action brought by Mervin against the County Review Committee for a judicial review of his 1961 wheat acreage allotment. *Gajewski* v. *The Review Committee of the Secretary of Agriculture*, etc., 321 F. 2d 543 (C.A. 8).

Petitioners did not contend, at any stage of the trial, that Mr. Garaas should be disqualified because (1) his former representation of them had resulted in his obtaining confidential information and (2) this information might have an adverse effect on the petitioners if used at the trial. *Consolidated Theatres* v. *Warner Bros. Cir. Man. Corp.*, 216 F. 2d 920, 925 (C.A. 2); *Marco* v. *Dulles*, 169 F. Supp. 622, 629 (S.D.N.Y.), appeal dismissed, 268 F. 2d 192 (C.A. 2); *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 354 (S.D.N.Y.). Although a motion to disqualify an attorney must be made with reasonable diligence,[6] no such contentions were made in the district court nor even in the court of appeals until petitioners filed their "Supplemental Brief" (Pet. A10–A11). Moreover, it appears affirmatively that, if such contentions had been timely urged, the government could have shown that there was no relationship between Mr. Garaas' representation of petitioners in 1952 and the charges contained in the instant indictment.[7] Finally, assuming *arguendo* that petitioners had shown the receipt of confidential information by Mr. Garaas in connection

[6] *Marco* v. *Dulles*, 169 F. Supp. 622, 632 (S.D.N.Y.), appeal dismissed, 268 F. 2d 192 (C.A. 2); Annotation at 52 ALR 2d 1243, 1268 and authorities cited. Compare *Johnson* v. *United States*, 318 U.S. 189, 200–201.

[7] We agree with petitioners that the statement by the court below that Mr. Garaas had represented petitioners on only one occasion, a 1952 lawsuit involving cancellation of oil leases on petitioners' land (Pet. A11), is not supported in the record on appeal (Pet. 6). There was no occasion at the trial to make this fact a matter of record for there was no contention there that Mr. Garaas should not have tried the case. The court below accepted as a fact this representation which Mr. Garaas made in his brief in that court.

with the cancellation of the oil leases, it seems hardly conceivable that any such information could bear on the matter of the false income tax returns which were the subject of Count III.[8]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1963.

[8] There is no need to discuss the contention (Pet. 13–15) that confidential records were improperly used in evidence against petitioners, for it is crystal clear that such records went only to Count I, and the sentences on Counts I and IV are ordered to run concurrently with that imposed on Count III. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Barenblatt* v. *United States*, 360 U.S. 109, 115 and cases cited.

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Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF THE PETITIONERS

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ARGUMENT

The Respondent has, in its Brief in Opposition (p. 2) completely recast the second question presented for review by Petitioner. Respondent here has adopted the position taken by the court below and has completely ignored the constitutional question involved. The question appears one not previously decided by this court. The guarantee

of the Sixth Amendment that in all criminal prosecutions, the accused shall enjoy the right "to have compulsory process for obtaining witnesses in his favor" becomes meaningless, if after bringing the witnesses to court, the trial judge can in his discretion prevent them from being sworn and giving testimony. It is beyond belief that an important constitutional right such as this should be in any way qualified and subject to the whims of the trial judge, reviewable only on the basis of "abuse of discretion".

The vice of Respondent's argument is pointed up by the statement which appears at page 9 of its Brief in Opposition, where it was said: "this request was properly refused on the grounds that such evidence was immaterial and irrelevant and the point was not pressed." The Respondent here is discussing a claimed purpose of Petitioners' efforts to call the Deputy Clerk for the purpose of placing in evidence certain Interrogatories involved in collateral civil cases.* The point is that the trial judge had not reached the evidentiary stage of the proceeding whereby he could intelligently rule upon the materiality or relevancy of the Interrogatories. Because there was no opportunity to have them marked as exhibits and offered in evidence after having been identified by the Clerk, there is no offer of proof in the record by which any reviewing court could determine whether the trial court was correct in his determination of relevancy and materiality. In fact, from the record it does not even appear that the trial court so much as looked at the records before making his determination. However, had the Clerk been sworn, the Interrogatories identified and offered, at

*Respondent cites only one of the Petitioners' collateral civil cases in footnote 5, appearing on page 9. Another is: *Merrin Gajewski v. United States*, Civil No. 17586 (8th Cir. Nov. term, 1963).

this point the requirement of the Sixth Amendment would have been fulfilled and the evidentiary stage reached, at which point the trial judge could intelligently make his decision as to admissibility and the record for review would leave no doubt.

The speculative conclusions appearing in Respondent's third paragraph of page 9 is in no way borne out by the record. Because of the state of the record caused by the conduct of the trial judge, it is difficult to positively demonstrate the relevancy and materiality or make other evidentiary evaluations of the Interrogatories from collateral civil cases. The Petitioners believe that the Interrogatories would have destroyed the basis for the Government's net worth theory in the case and upon which the Petitioners were convicted under Count 3.

Nor is there any basis to speculate that the testimony of the United States Attorney could have aided the defense of the Petitioners only as to Count 1. Apart from the fact that he had been their attorney on previous occasions and had handled land transactions for them, he was a personal acquaintance and neighbor in a small rural county. He undoubtedly had considerable knowledge of their character and in all likelihood, personal knowledge of the family finances which were under fire in this case. Here again, the conduct of the trial judge sanctioned by the court below prevents a proper record from being before this Court. If he had permitted the prosecutor to be sworn, the questions to have been propounded, we would at least know why it was that Petitioners questioned him. Objections might have been sustained to the question, but in that event it would have been appropriate for Petitioners to have made an offer of proof, and there might have been additional records before this Court. Certainly there can be no requirement however that an

offer of proof must first be made before invoking rights under the Sixth Amendment to compel testimony for the defense.

Furthermore, if Petitioners had been allowed to question Mr. Garaas under oath, it is unlikely that the court below would have been compelled to go outside the record to accept as fact, the representations of the United States Attorney as to his former dealings with the Petitioners (See Respondent's Brief, p. 10, fn. 7.) Petitioners are now in a position of never having had an opportunity in court to dispute the claim of the United States Attorney that he really did not obtain anything, during his prior representation of them as attorney, which had prejudiced them in this prosecution.

At footnote 8, page 11 in its Brief, the Respondent deals with question number 4 presented for review by Petitioners. Contention that it is "crystal clear" that the confidential ASC records illegally obtained by the Government went only to Count 1 and not to Count 3, is incorrect. As a matter of fact, the ASC records complained of under question number 4 was the primary source of information upon which the Government witness based his opinion of the net worth of the family and his yearly increase. For instance, one of the confidential records required to be filed by wheat farmers under 7 U.S.C. 1373 is the "Report of Acreage". On this form, farmers supply to the Government information as to the number of acres of wheat grown on his farm. In this case, it became a comparatively simple matter for the Government to calculate the number of bushels of wheat grown upon such acreage and apply to that figure the market price of wheat to determine gross income. At page 35 of the Government's Brief in the Court below it was argued that computations such as described above

convincingly proved that Defendants had income and thus could not legally claim to be dependents. In part, it was this claim that led to their conviction under Count 3. The Government, at the trial, might have proved their ownership of land without the confidential ASC records, but they could not have proved that the land was income producing and thus argue that Petitioners had a false statement when claiming dependency upon their parents. During the trial the Government introduced 229 exhibits. Of that number, 58 were exhibits taken from the files and records of the McKenzie County ASC Office. Many, if not all, of those records were the type specifically described in 7 U.S.C. 1733, but their bulk prevents full discussion in either the Petition for Certiorari or this Reply. We think it is enough here to point out solely that these records did not go solely to the conviction under Count 1, but that they were also effectively used to convict the Petitioners under the Count 3.

If Certiorari is granted, Petitioners have indicated (Pet. 3) they would challenge the Constitution on legal sufficiency of the evidence to support the verdict. Throughout the Reply Brief the Respondent argues that the evidence is sufficient and that in effect for that reason Certiorari ought to be denied. Because of the complexity and volume of the evidence in this case, it is impossible in the space allowed to adequately meet this charge. We can only say here that the evidence to support any of the counts upon which the Petitioners were convicted is insufficient and Respondent is wrong in its assertions to the contrary.

Respectfully submitted,

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